

Subject: FCC Order DA 06-2368: MCLM May 25, 2006 Letter from John Reardon, President of MCLM; and Impermissible Ex Parte

Date: Tuesday, June 8, 2010 12:17 PM

From: Jimmy Stobaugh <jstobaugh@telesaurus.com>

To: Gary Schonman <gary.schonman@fcc.gov>, Brian Carter <brian.carter@fcc.gov>, <austin.schlick@fcc.gov>, Scot Stone <Scot.Stone@fcc.gov>, jeff tobias <jeff.tobias@fcc.gov>

Cc: d brown <d.c.brown@att.net>, <RFox@mintz.com>, Jason Smith <jsmith@maritelusa.com>, "warrenhavens@mac.com" <warrenhavens@mac.com>, Warren Havens <warren.havens@sbcglobal.net>, Jimmy Stobaugh <jstobaugh@telesaurus.com>

Mr. Schonman and Mr. Carter, Enforcement Bureau

Mr. Tobias and Mr. Stone, Wireless Telecommunications Bureau

Austin Schlick, General Counsel, Office of General Counsel (copied here for purposes of the ex parte communication discussed last below and the attached prior request by Petitioners for action by the Office of General Counsel)

[Note: a copy of this email and its attachments will be filed on ULS under File No. 0002303355 and in WT Docket No. 10-83 and a copy served on Mr. Brown as stated below]

The below-listed parties (the "Petitioners") are sending this email to bring the following information to your attention for purposes of the FCC's ongoing investigation of Maritime Communications/Land Mobile LLC ("MCLM"). Please see the attached FCC Order, DA 06-2368, released 11/27/06, 21 FCC Rcd 13735, at Footnote 8 (the "Order") that reads as follows [underlining added for emphasis]:

MC/LM also submitted a letter to the Bureau on May 25, 2006, requesting that the Bureau complete the processing of long-form applications filed by winning bidders in Auction No. 61. Letter from John Reardon, President Maritime Communications/Land Mobile, LLC to Catherine W. Seidel, Acting Bureau Chief, Wireless Telecommunications Bureau (May 25, 2006). With the release of this Order, the Bureau is prepared to process MC/LM's application, FCC File No. 0002303355.

At no time did MCLM ever retract or correct its May 25, 2006 letter prior to or after grant of its Form 601 for Auction No. 61. The above-noted MCLM May 25, 2006 letter (as well as multiple other MCLM filings with the FCC and other documents submitted by Petitioners in the Section 308, Section 309 and Enforcement Bureau proceedings) clearly contradicts the responses of MCLM to the Enforcement Bureau's letters and to the Wireless Bureau's Section 308 letters that John Reardon was never President or an officer of MCLM, and shows those responses to be misrepresentations in that regard.

The Order also shows that the Wireless Telecommunications Bureau accepted the MCLM May 25, 2006 letter as being from Mr. Reardon as MCLM's President and that he had authority to submit the letter and request expedited processing of MCLM's Form 601. It is clear evidence in FCC records since 2006, prior to grant of the MCLM Form 601, that Mr. Reardon was an officer of MCLM during the relevant period of MCLM's Form 601 and, as such, he and his affiliates (e.g. Mobex and others) and their gross

revenues had to be disclosed on the MCLM Form 601, as required by Rule Sections 1.17, 1.65, 1.2105, 1.2110, and 1.2112.

The MCLM May 25, 2006 letter is also further evidence that Mobex is an affiliate of MCLM through common management (John Reardon was President and CEO of Mobex Network Services LLC and its parent company, Mobex Communications, Inc.: see e.g. http://www.alex4sensiblegrowth.org/candidates/reardon_q.html).

If Mobex's gross revenues (those of Mobex Network Services, LLC and Mobex Communications, Inc., and Mobex Communications' various subsidiaries, together "Mobex")) had been properly disclosed on the Form 175 and attributed to MCLM, then MCLM would not have qualified for the applied for bidding credit level (a disqualifying change under Section 1.2105) or any bidding credit at all when considering its other affiliates' gross revenues (per MCLM's request for refund to the Wireline Competition Bureau, Mobex had millions of dollars in revenues during the relevant years. The Mobex filed Forms 499-A for the relevant years also show this. These combined with the gross revenues of MCT Corp. (which the FCC and MCLM still have not disclosed to Petitioners, contrary to FCC rules, but that Petitioners have already shown from public and other records to be in the tens of millions of dollars range), American Nonwovens, MariTel, Inc., Bioventures, and all of MCLM's other affiliates would have disqualified MCLM from any bidding credit). Clearly, MCLM knew it did not qualify for the bidding credit it applied for or any at all. MCLM never updated its Form 601 (or its Form 602) to include Mr. Reardon and his affiliates, including Mobex, and their gross revenues and the Wireless Telecommunications Bureau never required it to do so, despite having the MCLM May 25, 2006 letter signed by John Reardon as MCLM's President.

Impermissible Ex Parte Communication

Per Section 1.1208, the May 25, 2006 letter was an impermissible ex parte communication in a restricted proceeding. Attached is Petitioners' previous filing with the FCC on this ex parte issue. In that filing, Petitioners' requested that action be taken against MCLM for its ex parte communication in its May 25, 2006 letter, however, Petitioners are not aware of any action ever being taken against MCLM by either the Wireless Telecommunications Bureau or the Office of General Counsel. Petitioners reiterate here again that request for action.

Sincerely,

Jimmy Stobaugh,
for Warren C. Havens, President
Skybridge Spectrum Foundation
Environmental LLC
Verde Systems LLC
Intelligent Transportation & Monitoring Wireless LLC
Telesaurus Holdings GB LLC
2649 Benvenue Ave.
Berkeley, CA 94704
Ph: 510-841-2220

Cc: Dennis Brown, counsel to MCLM
Russell Fox, counsel to MariTel, Inc.
Jason Smith, MariTel, Inc.
Warren Havens

Certificate of Service

I, Jimmy Stobaugh, an employee of Petitioners, certify that I have on this 8th day of June 2010 caused to be served a copy of this email and its attachments via first-class USPS mail to the following*:

Dennis Brown (legal counsel to MCLM)
8124 Cooke Court, Suite 201
Manassas, VA 20109

[Signature on File. Filed electronically.]

Jimmy Stobaugh

* The mailed copy being placed into a USPS drop-box today may not be processed by the USPS until the next business day.

On 5/23/10 10:33 PM, "Warren Havens" <warren.havens@sbcglobal.net> wrote:

Second try: this time addressed to the right Gary.

(I recalled the email below from the other Gary [ID now deleted in this final filing]: he has no relation to this matter.)

- W. Havens

----- Forwarded Message -----

From: Warren Havens <warren.havens@sbcglobal.net>

To: Gary ----- <----->; Brian Carter <brian.carter@fcc.gov>

Cc: Scot Stone <Scot.Stone@fcc.gov>; jeff tobias <jeff.tobias@fcc.gov>; d brown <d.c.brown@att.net>; RFox@mintz.com; Jason Smith <jsmith@maritelusa.com>; jstobaugh@telesaurus.com; warrenhavens@mac.com

Sent: Sun, May 23, 2010 10:23:03 PM

Subject: FN 0002303355. New evidence: Investigation of Depriests, MCLM, affiliates. Auction 61, Maritel, WPV etc

Mr. Schonman and Mr. Carter:

And Mr. Tobia and Mr. Stone for the WTB [*]

Attached are certain documents relevant to the above-referenced investigation [*] --

- (i) 5.23.10. Peter Hamer (PH) Curriculum Vitae Jan. '10.
- [1] 5.23.10. fr PH. Depriest (1) largest MCT owner, (2) \$12 million bond fraud.
- [2] 5.23.10. fr PH. Depriest. MCT revenues 2004-2003 well over \$70 million.
- [3] 5.23.10. fr PH. Ap '10 Crt Compl. Depriest 2003 MCT warrants & income to Phillips group.
- [4] 5.23.10. fr PH. '07 Depriest (1) Director BioVentures with massive profits (2) 'our sale' of MCT, etc.
- [5] 5.23.10. fr PH. Feb '10- Phillips Group Warrants in MCLM, related to FCC licenses, Depriest MCLM manager.
- [6] 5.23.10. fr PH. Aug '09 Third Bank v Depriest, \$300k note, false reps, and Chapter 11 likely.
- [7] 5.23.10. Aug 2002. MCLM. 1.41 response. auc 61- another copy to FCC Enforcement.

The first 7 attachments (up to item '[7]') add important new evidence to make additionally clear that Donald and Sandra Depriest and MCLM, with John Reardon and Dennis Brown, have for years deliberately and repeatedly violated FCC rules, the Communications Act, and the US criminal code, in submitting numerous fraudulent filings under penalty of perjury before the FCC to obtain AMTS licenses and license-bidding discounts, and in relation to Maritel, Wirelsss Properties of Virginia, and other matters.

(Documents previously submitted, including those with testimony in the case of Oliver Phillips vs. Donald Depriest [that Mr. Phillips won for over \$12 million in 2009] further show that Mr. Depriest engaged in wireless license matters before the FCC prior to these AMTS licensing matters, in a similar fashion: hiding other persons with disclosable interests.)

This entirely disqualifies MCLM from holding any geographic (or site-based) AMTS licenses, among other ramifications, based on Section 1.2015, the Commission's decision as to what that rule means when it implemented it (with regard to disqualification for any change in bidder size, or any change in control: both of which MCLM unquestionably engaged in after its Form 175 deadline in Auction 61) other FCC rules, and applicable court precedent. There is no question as to these facts or the applicable law.

These attached documents were sent last week to our office by Peter Harmer of Nashville TN. His resume is attachment '(i)' hereto (and also included in the other attachments behind his cover statement). He has given me and my companies permission to provide the attached documents to the FCC for purposes of your investigation, as his cover statement explain.

As Mr. Harmer explained to me, he has a long history of direct dealings with Donald Depriest and Mr. Depriest's financing agents and affiliates.

I and my companies have no past or current business or other relations with Mr. Harmer. He contacted us, along with others that have had, in the relevant time period of your investigation, direct financial and business dealings with Donald Depriest, Sandra Depriest, John Reardon, MCLM and affiliated parties.

Notes on the attached documents, that I added, explain some of the more obvious significance to your investigation, including-- in the Auction 61 relevant periods of time -- including--

(1) Donald Depriest (D. Depriest) was the manager officer that is, in real life, executing major business transactions for MCLM. That is an "officer" in fact (under all relevant statutory and case law), regardless of whatever names, re-naming, and games are now employed by Sandra and Donald Depriest to suggest otherwise.

- He and Sandra Depriest and Dennis Brown in fact falsely state otherwise in their sworn FCC filings: that is fraudulent and criminal, apart from a disqualifying violation of FCC rules and the Communications Act.

(2) Donald Depriest was the majority shareholder of, and the Chairman officer of, MCT Corp. (while later called honorary "Chairman" or other such title for FCC cover-up purposes, he acts as an "officer" as that term is defined in statutory and case law). MCT had well over \$70 million in gross revenues in the relevant years, as Donald Depriest reports herein.

- He and Sandra Depriest and Dennis Brown in fact falsely state otherwise in their sworn FCC filings: that is fraudulent and criminal, apart from a disqualifying violation of FCC rules and the Communications Act.

- They further falsely recently stated to the FCC they had no ability to obtain MCT records: no one can be the majority shareholder and Chairman and not have the company records for the period of those positions-- even for tax purposes those must be kept.

(3) Donald Depriest was a Director (on the Board) of Bioventures that, he writes in an enclosed document, had "massive profits."

- He and Sandra Depriest and Dennis Brown in fact falsely state otherwise in their sworn FCC filings: that is fraudulent and criminal, apart from a disqualifying violation of FCC rules and the Communications Act.

(4) Donald Depriest, signing as Manager of MCLM, issued warrants in MCLM the day before MCLM had to pay the FCC for its auction 61 high bids, when it borrowed over \$730,000 (in addition to past debt), and in issuing the ownership warrants, MCLM did not disclose the control that said ownership would result in, but had a condition that the ownership would not be passed to the warrant holders until "the license" of MCLM was received (this was agreed to on the eve of MCLM paying for the noted FCC license authorizations).

This appears to be a undisclosed controlling interest, or at least one that caused the warrant holders to be affiliates, such as by having ownership sufficient for a board seat or other level of control. This loan was on the very eve of the payment deadline, and leverage was likely in that case. No one accepts warrants that have not described ownership percentage and character: that was undisclosed in the official documents attached, as was the condition that "the license" had to be issued first-- but the Plaintiff attorney stated this condition in attempting get performance under the warrants, as on attached document shows at the end.

- He and Sandra Depriest and Dennis Brown in fact falsely state otherwise, by lack of disclosure, in many rounds of sword denials as to affiliates and relations of this sort: that is fraudulent and criminal, apart from a disqualifying violation of FCC rules and the Communications Act.

(5) One attachment, a 2009 court judgment and related documents, shows that, to get a \$300,000 bank loan in 2007, Donald Depriest made false representations and warranties that there was no government proceedings against him: the Auction 61 proceeding named him directly, as did two court cases against him and MCLM (that were disclosed to the FCC including in the Auction 61 proceeding).

- This is misrepresentation of the status of FCC licensing proceedings, and related court proceedings that the Depriest litigation counsel argued to the courts was fully under FCC exclusive jurisdiction and indeed field preemption under Section 332 of the Communications Act.
- While the Depriest litigation attorneys "at law" are busy bamboozling US and California courts that Depriest will take care of all challenges at the FCC where they belong, and while he hides in those FCC proceedings behind his wife, he tells his lender bank that there are no proceedings at all going on, then uses the loan to pay Dennis Brown to cover up at the FCC.

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We have been receiving many other documents -- including from other sources that came to us of their own accord who have direct knowledge of additional facts of decisional importance. Our office will complete review of and then send to you quite a few to you that are also relevant, in the near future, after reconfirming from the sources their permission to provide these on non-confidential or confidential basis, etc.

[*] My companies plan to use the attached in the Section 309 petitions to deny and reconsideration proceeding pending before the FCC related to the matters under your investigation at an appropriate point, but it is clear that your investigation is the means that, at this time, the FCC has elected to use regarding the subjects of the Section 309 proceeding. When we use the attached documents in said Section 309 proceeding, we expect to get into analysis of these and related documents.

However, to keep that Section 309 proceeding up to date, we will file this email and its attachments in that proceeding at this time.

That filing will include a service list including companies to whom MCLM is attempting to sell or lease AMTS spectrum: They all have more than sufficient knowledge of the fraud involved to make their purchase and lease attempts deliberate aiding and abetting. Their attorneys cannot mask that, and are also implicated.

Sincerely,
Warren Havens

President
Skybridge Spectrum Foundation

ATLIS Wireless LLC

Environmentel LLC
Verde Systems LLC
Telesaurus Holdings GB LLC
Intelligent Transportation & Monitoring Wireless LLC
Berkeley California

www.scribd.com/warren_havens <http://www.scribd.com/warren_havens>
www.atliswireless.com <<http://www.atliswireless.com>>
www.tetra-us.us <<http://www.tetra-us.us>>
510 841 2220 x 30
510 848 7797 -direct

From:

out of the Jackson firm by end of July at least, if you don't get it sooner fro

Federal Communications Commission

DA 06-2368

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
MARITIME COMMUNICATIONS/)	File No. 0002303355
LAND MOBILE LLC)	
)	
Application for New Automated Maritime)	
Telecommunications System Stations)	
)	
Request for Waiver of Section 1.2110(c)(5)(A) of)	
the Commission's Rules)	

ORDER

Adopted: November 27, 2006

Released: November 27, 2006

By the Chief, Mobility Division, Wireless Telecommunications Bureau:

1. *Introduction.* On September 7, 2005, Maritime Communications/Land Mobile, LLC (MC/LM or Applicant) filed the captioned application (Application) for new Automated Maritime Telecommunications System (AMTS) licenses for which it was the winning bidder in FCC Auction No. 61.¹ In the Application, MC/LM claims eligibility for a 35 percent bidding credit as a very small business, in support of which it provided gross revenue data for three disclosable interest holders.² At staff request, MC/LM amended the Application on August 21, 2006, to add revenue data for Donald R. DePriest (Mr. DePriest), the husband of Sandra M. DePriest (Mrs. DePriest), Officer, Director, and holder of a 100 percent indirect ownership interest in MC/LM.³ If Mr. DePriest's gross revenues are attributed to MC/LM, the Applicant concedes, MC/LM would be entitled only to a reduced bidding credit of 25 percent as a small, but not very small, business.⁴ MC/LM contends, however, that the "spousal attribution" rule pertaining to designated entity showings, Section 1.2110(c)(5)(iii)(A) of the

¹ See FCC File No. 0002303355, filed Sept. 7, 2005 (Application), as amended Aug. 21, 2006 (Amended Application).

² See Disclosable Interest Holders exhibit to Application. The listed disclosable interest holders were Communications Investments, Inc., Sandra M. DePriest (Mrs. DePriest), and S/RJW Partnership, L.P. The only gross revenues attributed to MC/LM were those of Mrs. DePriest, who had reported average gross revenues for the past three years of \$398,156.67.

³ See Attachment to Amended Application. MC/LM has repeatedly represented that Mrs. DePriest has held 100 percent control of MC/LM at all relevant times. See, e.g., *id.* at 1; Maritime Communications/Land Mobile, LLC and Paging Systems, Inc., *Order*, 21 FCC Rcd 8794, 8797-98 ¶ 7 n.38 (WTB PSCID 2006) (*August 2006 Order*) (citing MC/LM's representation in an opposition pleading that, "[a]t all times from the filing of MC/LM's Form 175 application to the date of the filing of the instant opposition, Sandra M. DePriest has held one hundred percent control of MC/LM"). The *August 2006 Order* was adopted by the Public Safety and Critical Infrastructure Division (PSCID) of the Wireless Telecommunications Bureau (Bureau). Pursuant to a Commission reorganization effective September 25, 2006, the relevant duties of PSCID were assumed by the Bureau's Mobility Division. See Establishment of the Public Safety and Homeland Security Bureau, *Order*, FCC 06-35 (rel. Sept. 25, 2006).

⁴ See Attachment to Amended Application at 1. According to the Attachment to the Amended Application, Mr. DePriest controls American Nonwovens Corporation (ANC), which had average gross revenues for the past three years of \$9,838,403. *Id.*

Commission's Rules,⁵ should not apply here because Mr. DePriest has no ownership interest in, and is neither an officer nor a director of, the Applicant, and he and Mrs. DePriest "live separate economic lives."⁶ Although MC/LM thus believes that no waiver of Section 1.2110(c)(5)(iii)(A) is required in this case, it requests such a waiver "in an abundance of caution," in case the Commission were to conclude differently.⁷ For the reasons that follow, we conclude that Section 1.2110(c)(5)(iii)(A) of the Commission's Rules requires the attribution of Mr. DePriest's revenues to MC/LM for purposes of determining its designated entity status. We further conclude that MC/LM has not demonstrated a basis for waiving that rule here. We find, therefore, that MC/LM is entitled only to a 25 percent bidding credit as a small business.⁸

2. *Background.* In 1981, the Commission designated spectrum for AMTS operations at the request of tug, towboat, and barge operators, who had complained that the existing ship-shore communications service was not adequate to meet their needs.⁹ The Commission has designated two spectrum channel blocks for AMTS operations.¹⁰ In 2002, the Commission adopted a geographic licensing approach for AMTS stations and, pursuant to statutory mandate, was required to use competitive bidding to resolve mutually exclusive applications.¹¹ On August 17, 2005, the Commission completed the auction of ten AMTS licenses in Auction No. 61.¹² MC/LM was the winning bidder for the Block A

⁵ 47 C.F.R. § 1.2110(c)(5)(iii)(A). Although MC/LM refers to this rule as the "spousal attribution rule," the rule itself uses the term "spousal affiliation."

⁶ See Attachment to Amended Application at 1.

⁷ *Id.* at 1-2.

⁸ MC/LM also submitted a letter to the Bureau on May 25, 2006, requesting that the Bureau complete the processing of long-form applications filed by winning bidders in Auction No. 61. Letter from John Reardon, President Maritime Communications/Land Mobile, LLC to Catherine W. Seidel, Acting Bureau Chief, Wireless Telecommunications Bureau (May 25, 2006). With the release of this Order, the Bureau is prepared to process MC/LM's application, FCC File No. 0002303355.

⁹ See Amendment of Parts 2, 81 and 83 of the Commission's Rules to Allocate Spectrum for an Automated Inland Waterways Communications System (IWCS) along the Mississippi River and Connecting Waterways, GEN Docket No. 80-1, 84 F.C.C. 2d 875, 876 ¶ 2 (1981), *on recon.*, *Memorandum Opinion and Order*, 88 F.C.C. 2d 678 (1982), *aff'd sub nom. WJG Tel. Co. v. FCC*, 675 F.2d 386 (D.C. Cir. 1982). The Commission originally allocated spectrum for AMTS use on the Mississippi River, then expanded the authorized service area to the Gulf Intracoastal Waterway in 1982, the Gulf of Mexico in 1984, and nationwide in 1991. See Amendment of Parts 2 and 80 of the Commission's Rules Applicable to Automated Maritime Telecommunications Systems (AMTS), *First Report and Order*, GEN Docket No. 88-372, 6 FCC Rcd 437 (1991); Amendment of Parts 2, 81 and 83 of the Rules to Add the Gulf of Mexico to the Authorized Service Areas of Maritime Mobile Systems Operating in the 216-220 MHz Band, *Report and Order*, GEN Docket No. 84-18, 56 Rad. Reg. 2d (P & F) 1613 (1984); Amendment of Parts 2, 81 and 83 of the Rules to Add the Gulf Intracoastal Waterway to the Authorized Service Area of Inland Waterways Communications Systems, *Report and Order*, GEN Docket No. 81-822, 51 Rad. Reg. 2d (P & F) 440 (1982). In 1997, the Commission adopted rules to permit AMTS stations to provide commercial service to units on land, as well as to maritime vessels. See Amendment of the Commission's Rules Concerning Maritime Communications, *Second Report and Order and Second Further Notice of Proposed Rule Making*, PR Docket No. 92-257, 12 FCC Rcd 16949, 16965 ¶ 24 (1997); 47 C.F.R. § 80.123.

¹⁰ AMTS Channel Blocks A (217.5-218/219.5-220 MHz) and B (217-217.5/219-219.5 MHz). See 47 C.F.R. § 80.385(a)(2).

¹¹ See Amendment of the Commission's Rules Concerning Maritime Communications, *Second Memorandum Opinion and Order and Fifth Report and Order*, PR Docket No. 92-257, 17 FCC Rcd 6685, 6686-87, 6695, 6718 ¶¶ 2, 21, 79 (2002); 47 U.S.C. § 309(j)(1).

¹² See Auction of Automated Maritime Telecommunications System Licenses Closes: Winning Bidders Announced for Auction No. 61, *Public Notice*, 20 FCC Rcd 13747 (WTB 2005) (*Auction Closing PN*). The licenses available in Auction No. 61 were those for which there was no winning bidder in the first AMTS auction, Auction No. 57, which

(continued....)

licenses covering the Mid-Atlantic, Mississippi River, Great Lakes, and Southern Pacific regions.¹³ MC/LM timely submitted its down payment and long-form application, and on October 31, 2005, the Wireless Telecommunications Bureau issued a Public Notice announcing that MC/LM's long-form application had been accepted for filing.¹⁴

3. In Auction No. 61, a winning bidder that qualified as a very small business was entitled to claim a bidding credit of 35 percent, and a winning bidder that qualified as a small business was entitled to claim a bidding credit of 25 percent.¹⁵ A "very small business" is defined as an entity with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years, and a small business is defined as an entity with attributed average annual gross revenues of more than \$3 million but less than \$15 million for the preceding three years.¹⁶ Section 1.2110(c)(5)(iii)(A) of the Commission's Rules provides in relevant part that, for purposes of determining the affiliates of an applicant claiming designated entity status, "[b]oth spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States."¹⁷

4. As noted, MC/LM claims eligibility for a 35 percent bidding credit as a very small business, but concedes that, if Mr. DePriest is deemed an "affiliate" of MC/LM, the attribution to MC/LM of his average gross revenues would render MC/LM eligible for only a 25 percent bidding credit as a small business.¹⁸ MC/LM argues that such attribution is not required or warranted under Section 1.2110(c)(5)(iii)(A), because Mr. DePriest has no ownership interest or position in MC/LM, and Mr. and Mrs. DePriest "have their own, separate sources of revenue."¹⁹ Under these circumstances, MC/LM contends, "the presumption of spousal affiliation ... is rebutted..."²⁰ In the event that the Commission disagrees, concluding that Mr. DePriest's revenues are attributable to MC/LM under Section 1.2110(c)(5)(iii)(A), MC/LM requests a waiver of that rule.²¹ MC/LM argues that unique circumstances exist which make it "unreasonable" to apply the spousal affiliation rule to MC/LM, again pointing to the financial and professional independence of the DePriests.²² MC/LM adds that, given the "separate character of [the DePriests'] economic lives and their independent, substantial contributions to society," the underlying purpose of the rule, which MC/LM says is "to prevent the award of bidding credits to persons or entities who are not entitled to them," would not be served by applying the rule in this

(...continued from previous page)

closed on September 15, 2004. See Auction of Automated Maritime Telecommunications System Licenses Scheduled for August 3, 2005, *Public Notice*, 20 FCC Rcd 7811, 7816 (WTB 2005) (*Procedures PN*).

¹³ See *Auction Closing PN*, 20 FCC Rcd at 13755.

¹⁴ See Wireless Telecommunications Bureau Announces that Applications for Automated Maritime Telecommunications System Licenses Are Accepted for Filing, *Public Notice*, 20 FCC Rcd 17066 (WTB 2005).

¹⁵ See 47 C.F.R. §§ 1.2110(f)(2)(i)-(ii), 80.1252.

¹⁶ 47 C.F.R. § 80.1252. See *Procedures PN*, 20 FCC Rcd at 7828-29.

¹⁷ 47 C.F.R. § 1.2110(c)(5)(iii)(A).

¹⁸ See Attachment to Amended Application at 1.

¹⁹ *Id.* MC/LM also represents that Mrs. DePriest "was, at one time, an officer of ANC and did some work for that company more than ten years ago," but has had no relationship with ANC since then. *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1-2. MC/LM represents, *inter alia*, that "Sandra has a well established professional and clerical life of her own and is fully capable of operating MC/LM without contribution by or interference from Don." *Id.*

instance.²³ Finally, MC/LM also asserts that the public interest would be served by providing the larger 35 percent bidding credit to a woman-owned business.²⁴

5. *Discussion.* We conclude that Section 1.2110(c)(5)(iii)(A) of the Commission's Rules clearly requires that the revenues of Mr. DePriest, including those stemming from his ownership and control of ANC, be attributed to MC/LM.²⁵ Although MC/LM claims that it has made a sufficient showing to rebut application of the spousal affiliation rule, this argument fails for the simple reason that the rule does not establish a presumption of spousal affiliation that is subject to rebuttal, but rather a hard and fast requirement that spouses be deemed affiliates unless they are legally separated.²⁶ The spousal

²³ *Id.* at 2.

²⁴ *Id.*

²⁵ The instant Order addresses only the issue of whether the revenues of Mr. DePriest are properly attributable to MC/LM. We therefore dismiss as an unauthorized pleading a "Request to Place on Public Notice, Request for Leave to Supplement, and Request to Dismiss" (Request) filed on September 12, 2006, by Warren C. Havens (Havens), acting individually and as the president of entities that filed competing applications in Auction No. 61. *See, e.g.*, 47 C.F.R. § 1.45; Kim Shaw Wong, *Memorandum Opinion and Order*, 11 FCC Rcd 11928, 11930 ¶ 7 (1996). The Bureau previously addressed a petition to deny filed by Havens (and the Havens-controlled entities) against the Application, in which he contends, *inter alia*, that MC/LM should be disqualified to hold these licenses based on alleged real-party-in-interest violations, misrepresentations to the Commission, and other transgressions. *See August 2006 Order*, n.3, *supra*. Havens has filed a petition for reconsideration of the *August 2006 Order*, and our action herein is without prejudice to resolution of the issues raised in that petition for reconsideration. There is no need or reason to consider those same issues here. Havens is incorrect in contending that the amendment to the Application is a major amendment, requiring that it be placed on public notice. *See Request* at 3. Neither Section 1.2105(b) of the Rules, 47 C.F.R. § 1.2105(b), which expressly pertains only to short-form applications and to "certifications required by this section," nor Section 1.929(a)(2), 47 C.F.R. § 1.929(a)(2), classifies MC/LM's amendment as a major amendment. Section 1.929(a)(2) treats as major any amendment reflecting a "substantial change in ownership or control" of an applicant, but MC/LM does not represent that any such substantial change of ownership has occurred, and, as discussed below, our determination that Mr. DePriest's revenues must be attributed to MC/LM due to the spousal affiliation rule is not based on a finding that he exercised actual ownership or control. In addition, the Commission previously ruled that a post-auction amendment that *decreases* an applicant's bidding credit, as here, is a minor amendment, and a federal court of appeals upheld that ruling. *See Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155, 162-63 (D.C. Cir. 2003), *reh'g and reh'g en banc denied*, April 10, 2003, *cert. denied*, 540 U.S. 981, 124 S.Ct. 463, 157 L.Ed.2d 371 (2003). In any event, given that we determine that MC/LM is eligible only for the 25 percent bidding credit, the less favorable to MC/LM of the two possible outcomes under consideration here, we fail to see how this decision harms Havens in any way. *See id.* at 162-63 (stating that the Court, like the Commission, does not see how other bidders are prejudiced, or the integrity of the auction process adversely affected, by a bidder's mistaken assumption that it was entitled to a greater bidding credit than it ultimately is accorded).

²⁶ The kinship affiliation rule, 47 C.F.R. § 1.2110(c)(5)(iii)(B), which applies to specified immediate family members of an applicant, does provide for a rebuttable presumption of affiliation, but that rule is not at issue in this case. In adopting the kinship affiliation rule, the Commission incorporated the definition of "immediate family member" in the Small Business Administration's rules, 13 CFR § 124.100 (1994), which included, among others, husbands and wives, step-parents, step-children, half-siblings, and in-laws. However, the more specific spousal affiliation rule requires that spouses be deemed affiliates with the sole exception of when the spouses are legally separated. MC/LM does not argue, and we discern no basis for finding, that application of the narrowly focused spousal affiliation rule can be supplanted in this case by application of the kinship affiliation rule. In adopting these rules, the Commission made clear that it intended that a more rigorous standard apply to spouses than to other family members. *See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, Second Memorandum Opinion and Order*, PP Docket No. 93-253, 9 FCC Rcd 7245, 7262 ¶ 102 (1994) ("Because we believe kinship relationships in many cases do not present the same potential for abuse that exists with spousal relationships, particularly in terms of the 'identity of interest' that are likely to exist between the persons involved, we shall adopt a more relaxed standard for determining when kinship interests must be attributed to applicants").

affiliation rule establishes what the Commission termed “a workable bright-line standard,”²⁷ based on the relevant Small Business Administration regulations, and is intended to obviate the need for case-by-case determinations as to whether a particular applicant’s spouse should be deemed an affiliate, and his or her revenues attributed to the applicant.²⁸ Rather than entertain individualized demonstrations of spousal independence, such as the “rebuttal” showing offered here by MC/LM, the Commission determined that “we will in every instance attribute the financial interests of an applicant’s spouse to the applicant,”²⁹ except in cases of legal separation recognized by a court of competent jurisdiction.³⁰ The Commission recognized that this approach could lead in some cases to “harsh results,” but concluded that this consideration was outweighed by the benefits of a bright-line rule in terms of clarity and certainty.³¹ We thus conclude that the spousal affiliation rule does apply to MC/LM, notwithstanding its claims regarding Mrs. DePriest’s financial independence from Mr. DePriest and her exercise of sole control over MC/LM. Accordingly, absent a waiver, Mr. DePriest’s revenues must be attributed to MC/LM for purposes of determining its designated entity status.

6. Section 1.925 of the Commission’s Rules provides that we may grant a waiver if it is shown that (a) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and grant of the requested waiver would be in the public interest; or (b) in light of unique or unusual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.³² Based on the record before us, we conclude that the waiver request should be denied.

7. With respect to the first prong of the waiver standard, MC/LM argues that the purpose of the spousal affiliation rule is “to prevent the award of bidding credits to persons or entities who are not entitled to them,” and that this regulatory purpose would not be undermined if we do not attribute Mr. DePriest’s revenues to MC/LM.³³ We disagree. The premise of this argument is that MC/LM should receive a 35 percent bidding credit, irrespective of the revenues of Mr. DePriest, because the latter has no interest in or control of MC/LM, and leads what MC/LM terms an “independent economic life” from that of his wife, MC/LM’s real-party-in-interest. As discussed above, however, the spousal affiliation rule is based on precisely the opposite premise: that, except in cases of legal separation, determining an applicant’s entitlement to a particular designated entity status should *always* take into account the spouse’s revenues. Given that the Commission adopted this bright-line rule with a clear understanding that it might result in attributing to an applicant spousal revenues that are not actually available to the applicant, but nonetheless determined that such a rule would serve the public interest as an administratively efficient safeguard against “gaming” the system, we are not persuaded that the purpose of the rule is undermined whenever it is applied to require attribution of the revenues of a spouse who may not in fact provide financial support or otherwise play a role in the applicant’s operations.

8. For the same reason, we are not persuaded that spousal independence such as is claimed here should be deemed a unique or unusual circumstance warranting grant of a waiver under the second prong of the Section 1.925(b)(3) standard. Again, the fact that the Commission specifically contemplated

²⁷ *Id.* at 7262 ¶ 101.

²⁸ *Id.* at ¶¶ 99-101.

²⁹ *Id.* at ¶ 100.

³⁰ *Id.* at ¶ 101.

³¹ *Id.*

³² 47 C.F.R. § 1.925(b)(3); *see also* *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

³³ *See* Attachment to Amended Application at 2.

that the rule would require attribution of a spouse's revenues even with respect to those applicants who might be able to demonstrate that they would receive no benefit from those revenues precludes a finding that such spousal independence is the type of unusual or unique circumstance that justifies a waiver of the rule. Far from being unique or unusual, situations such as the one presented here were expressly foreseen when the Commission adopted the spousal affiliation rule. To grant MC/LM a waiver of the spousal affiliation rule on the basis of this showing would no doubt spur a considerable number of similar requests, and require the kind of case-by-case review of showings of spousal independence that the Commission intended to avoid through application of a bright-line rule. We conclude, therefore, that MC/LM has not shown that it is deserving of waiver relief under either prong of the Section 1.925(b)(3) waiver standard.³⁴

9. *Conclusion.* Under Section 1.2110(c)(5)(iii)(A) of the Commission's Rules, MC/LM must include the revenues of Donald R. DePriest in calculating its eligibility for a bidding credit as a designated entity. The record does not provide a basis for granting MC/LM a waiver of the rule under either prong of the Section 1.925 waiver standard. Accordingly, MC/LM must be classified as a small business, rather than a very small business, for purposes of Auction No. 61, and is therefore entitled only to a bidding credit of 25 percent.

10. For the aforementioned reasons, IT IS ORDERED that application FCC File No. 0002303355, filed on September 7, 2005, as amended August 21, 2006, SHALL BE PROCESSED consistent with this Order and the Commission's Rules.

11. IT IS FURTHER ORDERED that, pursuant to Sections 1.2109, 1.2110 and 80.1252 of the Commission's Rules, 47 C.F.R. §§ 1.2109, 1.2110, 80.1252, Maritime Communications/Land Mobile, LLC must submit a payment to cover the difference between the total payments Maritime Communications/Land Mobile, LLC has submitted to the Commission, which equal the net winning bid amount as calculated with a very small business bidding credit, and the net winning bid amount as calculated with a small business bidding credit within ten (10) business days of the release of this Order or, if it fails to pay this balance within ten (10) business days of the release of this Order, it may pay the remaining balance within ten (10) business days after the payment deadline, provided that it also pays a late fee equal to five percent of the amount due.

12. IT IS FURTHER ORDERED that, pursuant to Sections 1.3 and 1.925 of the Commission's Rules, 47 C.F.R. §§ 1.3, 1.925, the Request for Waiver filed by Maritime Communications/Land Mobile, LLC on August 21, 2006, IS DENIED.

13. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.45 of the Commission's Rules, 47 C.F.R. § 1.45, the

³⁴ We need not address at length MC/LM's argument that the public interest would be served by grant of a waiver because MC/LM is a woman-owned business. Under both prongs of the Section 1.925 waiver standard, a finding that the waiver would serve the public interest is not by itself sufficient to support a waiver. There must be an additional finding – either a finding that the purpose of the rule would not be served or would be frustrated, under the first prong, or a finding of unique or unusual circumstances, under the second prong – in order to support a waiver, and as we discuss *supra*, we are unable to make either finding here. Moreover, even under a more generalized good cause waiver standard, *e.g.*, 47 C.F.R. § 1.3, we are not persuaded that a waiver should be granted simply because the requester is a woman-owned business. *Cf.* Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, GEN Docket No. 90-314 & ET Docket No. 92-100, 15 FCC Rcd 10456, 10475 ¶ 37 (2000) (declining to apply gender-based designated entity provisions in light of the Supreme Court's *Adarand* decision, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)).

Request to Place on Public Notice, Request for Leave to Supplement, and Request to Dismiss filed by Warren C. Havens on September 12, 2006, IS DISMISSED.

14. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.45 of the Commission's Rules, 47 C.F.R. § 1.45, the Opposition to Request to Place on Public Notice, Request for Leave to Supplement, and Request to Dismiss filed by Maritime Communications/Land Mobile, LLC on September 26, 2006, IS DISMISSED AS MOOT.

15. This action is taken under delegated authority pursuant to Section 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Roger S. Noel
Chief, Mobility Division
Wireless Telecommunications Bureau

From: wchavens@aol.com
Sent: Sunday, June 04, 2006 11:10 PM
To: CatherineW.seidel@fcc.gov; Greg.Christopher@fcc.gov
Cc: Fred.Campbell@fcc.gov; Scot.Stone@fcc.gov; d.c.brown@att.net;
jharvey@nrtc.org; arasmussen@hallestill.com; dlmartin@hhlaw.com;
jstobaugh@telesaurus.com
Subject: Re: Undated letter, MCLM to Ms. Seidel, re Auction 61

This emails replaces the email sent 6/3 at 4 pm.

- W. Havens

- - - -

Chief, Wireless Telecommunications Bureau, and Office of General Counsel,

WTB: Please confirm receipt of this email.

OGC: Please confirm receipt of this email.

Intelligent Transportation & Monitoring Wireless LLC ("ITL"), and AMTS Consortium LLC ("ACL"), were high bidders in Auction 61, the second AMTS auction.

ITL and ACL received a copy of an undated two-page letter, postmarked May 25, 2006, from John Reardon of MCLM to Catherine W. Seidel at the Wireless Bureau (the "Letter").

For reasons given below, ITL and ACL are copying the Office of General Counsel on this email, in accord with Section 1.1214, and request that sanctions be applied against MCLM under Section 1.1216.

ITL and ACL request that the Bureau deliver a copy of the Letter to the Office of General Counsel for this purpose.

ITL and ACL request a written decision on this request.

As an initial matter, the Letter presumed to speak for ITL and ACL. MCLM had no authority to do so whatsoever.

The Letter solely concerns the long forms of MCLM and other high bidders in Auction 61, all of which are subject to petitions to deny not yet ruled upon.

In the Letter MCLC (i) asserts facts and makes arguments as to why its long form should be granted, and (ii) urges that it be granted soon. The Letter does not merely ask the status of its long form: only such simple status inquiries are exempt from "presentations" under Section 1.1202. This exemption does not extend to requests for expedition, nor assertions of facts and arguments in seeking a grant of a contested license application.

The Letter includes:

" Having completed all . . . requirements . . . MCLM . . . requests . . . that the Bureau complete processing of auction applications and grant applications MCLM urges MCLM . . . design[ed a] business plans which incorporate an agile and quickly moving deployment campaign so that the public can be served. . . the pace with which . . . grant procedures are proceeding is detrimental. . . . The Commission has a stated goal of expeditiously awarding auctioned licenses and promoting confidence in the auction and post-auction process as well as ensuring that auctioned spectrum can be put to the best and highest use as soon as possible. To that end, MCLM respectfully requests that the Bureau complete the processing of applications for spectrum which was auctioned during Auction No. 61 and that the spectrum be allowed to be put to use and made available to the public as soon as possible. "

Clearly, MCLM is arguing, or wheedling, for grant of its long form. It is not merely asking about the status of the processing of the long form and related petition to deny (that is simple enough and normally done by phone). MCLM is urging the Commission to grant its long form, based on its assertions of "having completed all requirements [and having] agile and quick[] . . . campaign to the best and highest use." MCLM is trying to sway the reader as to why its long form should be granted, based on its asserted compliance with FCC requirements, its plans and capabilities, and on cited general Commission policy of expeditious licensing (as if such general policy should cause diversion from specific policy on denial for good cause under a petition to deny). Those are all contested matters in the restricted proceeding.

Due to the subject ex parte rules, ITL and ACL does not give any counter factual assertions and arguments here.

The Letter is a prohibited ex parte communication under Section 1.1208. No ex parte presentations are permitted in restricted proceedings: copying other parties does not cure this (even if the letter was properly dated, so that the copied parties could tell if they were timely served, if it was a permitted filing).

Accordingly, ITL and ACL are copying the Office of General Counsel on this email, in accord with Section 1.1214, and request that sanctions be applied against MCLM under Section 1.1216.

ITL and ACL request a written decision on this request.

Regarding non-FCC parties copied: they are Dennis Brown, counsel to MCLM (John Reardon who signed the Letter did not list therein an email for himself or MCLM), and parties copied on the ITL and ACL petition to deny the subject MCLM Auction 61 long form for reasons given therein: Jack Harvey, and officer at National Rural Telecommunications Cooperative, and Audrey Rasmussen, counsel to Paging Systems Inc. David Martin, also copied, is at Hogan & Hartson which represents ACL.

Sincerely,

Warren Havens
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